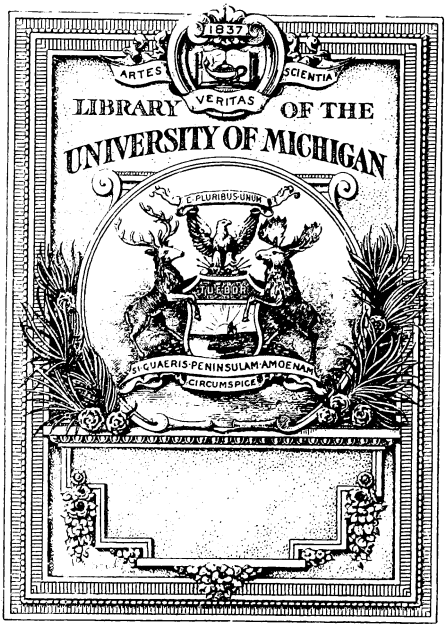

BELLIGERENT RIGHT

ON

THE HIGH SEAS,

SINCE THE

DECLARATION OF PARIS (1856).

BY

SIR TRAVERS TWISS, D.C.L., F.R.S.,

MEMBER OF THE INSTITUTE OF INTERNATIONAL LAW AND ONE OF HER MAJESTY'S COUNSEL.

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ON BELLIGERENT RIGHT ON THE HIGH SEAS, SINCE THE DECLARATION OF PARIS (1856).

A Generation of Statesmen has passed away since the Plenipotentiaries of the Seven Powers, who took part in the Congress of Paris of 1856, agreed upon a Declaration respecting Maritime Law, the motive of which was a desire to render war, as a state of international relations, as little onerous as possible to neutrals. The object of the Powers, as expressed in the preamble of the Declaration, was to establish an uniform doctrine on certain points, on which the uncertainty of the Law and of the duties resulting therefrom gives rise to differences of opinion between belligerents and neutrals, that may occasion serious difficulties and even conflicts between them. Their first Resolution accordingly was to declare Privateering (La Course) to be abolished. Their second and third Resolutions restricted the belligerent right of interference with neutral commerce to cases where that commerce was materially sustaining the enemy's defence. The fourth Resolution declared that blockades in order to be binding must be effective. The Signatory Powers on this occasion undertook to invite the States, which had not taken part in the Congress, to accede to the Declaration. Of the States so invited, two States only of the first rank as Maritime Powers declined to accede to the Declaration. The United States of America were unwilling to adhere to the first Resolution unless the Powers would go one step further and apply the principle of inviolability to all private property on the High Seas. Spain on the other hand objected absolutely to the abolition of Privateering, and on the same grounds, Mexico, Venezuela, New Granada, Bolivia and Uruguay have not given

their adhesion to the Declaration. In pursuance therefore of the concluding paragraph of the Declaration, the Resolutions of the Signatory Powers are not binding upon the Powers above-mentioned, which have not acceded to it.

It should be observed that the Declaration of Paris has not made the non-observance of its provisions an offence against the Law of Nations. The Declaration is, in fact, nothing more than a solemn pledge on the part of the States, which have signed or adhered to it, that they will mutually observe its provisions in their relations towards one another. They have not undertaken to enforce its provisions against the States, which may decline to adhere to them, although they have agreed in a Protocol of their proceedings, subsequent to the signing of the Declaration, not to enter for the future into any arrangement on the application of the Right of Neutrals, in time of war, that does not at the same time rest upon the four principles, which are the object of the said Declaration. On the other hand they remain perfectly free to extend the benefit of the Declaration to neutrals in a war against an enemy, who has not become a party to it. In fact, it may be a question as we shall presently consider more carefully, whether they are not under an obligation in such a war to allow to such neutrals as have acceded to it the full benefit of its provisions as regards their commerce on the High Seas.

Since the Deliberations of the Congress of Paris were brought to a close, no less than eight great wars have interrupted the peaceful course of the world's history. The majority of those wars have been confined to Europe, and have but slightly interfered with neutral commerce on the High Seas, having been directed mainly to the movements of armies on land with a view to the aggrandisement or adjustment of territory. The war, for instance, of France and Sardinia as allies against Austria in 1859 terminated in the cession of Lombardy on the part of Austria to France,

and its transfer by France to Sardinia. The Sleswig-Holstein War of 1864 terminated in the King of Denmark renouncing his sovereignty over the Duchies of Sleswig and of Holstein, and likewise over the Duchy of Lauenberg, all of which Duchies have subsequently passed under the dominion of Prussia. The Austro-Italian war of 1866 ended in Austria ceding her Lombardo-Venetian Provinces to the Emperor of the French, who tranferred them to the King of Italy. TheAustro-Prussian war of the same year terminated in the withdrawal of Austria with her German possessions from the Germanic Confederation. The Franco-German war of 1870 ended in the renunciation on the part of France of her sovereignty over Alsace and part of Lorraine in favour of the German Empire. The Russo-Turkish war of 1878 terminated in the severance of the Kingdoms of the Lower Danube from the Ottoman Empire, and in the cession by Turkey of Batoum and other territory on the coast of the Black Sea to Russia. There was little or no occasion to call for any interpretation of the Resolutions of the Congress of Paris as regards the incidents of these six wars, except in the case of the Franco-German war. In the wars of 1866 both Prussia and Italy were of one mind with Austria in not interfering in any way with commerce on the High Seas, even in the case of enemy merchant vessels. On the other hand, in the war between France and Germany in 1870, the King of Prussia issued an Ordinance to exempt all enemy merchant vessels from capture on the High Seas on condition of reciprocity on the part of France, but as France thought it more for her interest to exercise the right of capture under the General Law of Nations against enemy merchant vessels, the King of Prussia revoked his Ordinance. Some discussion however arose in the course of this war as to the proper interpretation to be given to the first Resolution of the Seven Powers, according to which Privateering (La Course) was declared to be abolished, and likewise as to

whether "Coal" was to be accounted an article contraband of war within the intent of the Second and Third Resolutions of the Powers. On the subject of an effective blockade no occasion arose in the course of the above six wars, as far as we are aware, to consider the novel definition of such a blockade as agreed upon by the Powers in 1856, and accordingly it may be justly said that the precise interpretation to be given to the Fourth Resolution is *res integra* as far as the six wars above mentioned are concerned.

Mr. Dana in his edition of Wheaton's Elements of International Law, p. 610, has observed in a note upon the second Resolution of the Declaration of Paris, that "if a nation party to the Declaration is at war with one that is not, the former is not bound to abandon its right to take enemy's goods from vessels of neutral nations, which are parties to the Declaration, and as the stipulation is made not from any doubts that as between belligerents only such captures are the natural and proper results of war, but for the benefit of neutrals vexed thereby, all parties to the Declaration, when they are neutral, are in danger of losing the benefits of it." The conclusion, at which Mr. Dana arrives, seems to be insufficiently warranted, if the circumstances which led to the Declaration of Paris are taken into account, seeing that the Declaration of the Seven Powers assembled in Congress was simply a confirmation on their part of a Reform in the practice of Maritime warfare, which had been inaugurated by France and Great Britain in 1854 under a mutual agreement with respect to neutrals in a war against an enemy who was no party to the agreement. A memoir read by M. Drouyn de Lhuys before the French Academy on 4th April, 1868, may be cited in illustration of the views upon which France and Great Britain acted in 1854. His Excellency, who was Minister of Foreign Affairs in Paris in 1854, and who in that capacity initiated the mutual

compromise between France and Great Britain, which was subsequently embodied in the second and third Resolutions of the Declaration of 1856, thus expresses himself :—" The system inaugurated by the war of 1854 responded so well to the common wants of all countries, that it took without difficulty the character of a definitive Reform of International Law. At the Congress of Peace assembled in Paris in 1856, the Plenipotentiaries, whose mission it was to consecrate the results of the war, found themselves naturally led to comprise in it the confirmation of the Rules, which had been observed by the Belligerent Powers with regard to Neutrals. This was the object of the Declaration of Paris of 1856.*

Mr. Dana does not appear to have been aware at the time when he so interpreted the Declaration of Paris, that France and Great Britain, the two Powers with whom the Declaration originated, had in practice put an interpretation on the second and third Resolutions, which is calculated to relieve all neutrals, who have adhered to the Declaration of Paris, from all risk of losing the benefit of their adherence to it under the circumstances contemplated by Mr. Dana. For instance, in anticipation of a joint war against China, which Power has not acceded to the Declaration of Paris, France and Great Britain as allies in the event of war, issued each of them an ordinance " as to the observance of the Rules of Maritime Law under the Declaration of the Congress of Paris of 1856 towards the vessels and

* " Le Système inauguré par la guerre de 1854 répondait si bien à des besoins communs à tous les peuples, qu'il prit sans difficulté le caractère d'une réforme définitive du Droit International. Au Congrès de Paix réuni à Paris en 1856, les Plénipotentiaires, qui eurent pour mission de consacrer les résultats de la guerre, se trouvèrent naturellement amenés à y comprendre la confirmation des règles qui avaient été observées par les Puissances belligérantes à l'égard des neutres."—Les Neutres pendant la guerre d'Orient, par son Excellence M. Drouyn de Lhuys. Mémoire lu à l'Académie des Sciences Morales et Politiques, dans la Séance du 4 Avril, 1868, p. 40, Paris, 1868.

goods of the enemy and of neutral Powers." The British Order in Council of 7th March, 1860, will be found in Vol. XI. of Sir Edward Hertslet's Treaties, p. 110.* Under that Order it is provided that so far as regards ships of any neutral Power, the flag of any such Power shall cover the enemy's goods with the exception of contraband of war, and, further, that neutral goods with the exception of contraband of war shall not be liable to capture under the enemy's flag by reason only of the said goods being under the enemy's flag. That this in the opinion of France and Great Britain is the due interpretation of the second and third Resolutions of the Declaration is confirmed by the language of the preamble of the above Order in Council, which states that it was the desire of the two Allied Powers to act in the event of war in strict conformity with the Declaration of Paris. A further instance is forthcoming to the same effect in the instructions issued by the Republics of Chili and of Peru to their cruizers in 1865. Both of these Republics have acceded to the Declaration, but Spain, against which Power they were both engaged in war in 1865, has not given her adherence to the Declaration. Nevertheless the Governments of the above Republics issued identical instructions to their cruizers not to seize Spanish goods on board of neutral vessels, nor neutral goods on board of Spanish vessels, except in cases where such goods were contraband of war, thereby adopting the same interpretation of the second and third Articles of the Declaration, which Great Britain and France had announced in contemplation of a war against China in 1860. A still further instance is forthcoming in the French Instructions of 25th July, 1870, during the war with Prussia 1870-71, when the principles of the Declaration were declared to be applicable to Spain and the United

* A decision to the same effect was published by the Emperor of the French on 28th March, 1860.

States, notwithstanding those Powers had not adhered to the Declaration of Paris.

The two points in the Declaration upon which, as already remarked, considerable light has been thrown during the Franco-German war of 1870, are the interpretation that is to be given to the term " La Course," which occurs in the first Resolution, and likewise the interpretation to be given to the term " Contraband of War," which occurs in the second and third Resolutions. The phrase " La Course " dates from a period, when it was the practice of States, whenever there was occasion to have recourse to an armed expedition on the high seas against another State, to grant Letters of Marque to the commanders of private cruisers, authorising them to make reprisals against the vessels and cargoes of the subjects of the other State. By-and-by Commissions of War come to be issued by Sovereign Princes to private ships fitted out either by their own subjects, or by the subjects of other Powers, so that it was competent for a Power which had no public ships of war of its own to harass the commerce of its enemy by issuing Letters of Marque and Reprisals not merely to vessels of its own subjects, but to the vessels of the subjects of other Powers, and when Commissions of War came to be granted to both classes of such vessels in the Sixteenth Century, they had lawful authority to exercise belligerent rights against neutrals as well as against the enemy. It can well be imagined, as the crews of such ships were brought together by the prospect of plunder, and were under no naval discipline, that, when a single corsair or privateer hove in sight on the high seas, it caused a greater terror to a neutral merchant ship than a fleet of Public ships of war.

In the present century however as the practice of States in entrusting their defence on land to regiments of foreign origin serving them for pay has generally been discarded, so the practice of granting commissions of war to the

subjects of foreign States, serving for plunder, has fallen into disrepute, to say nothing of the license of maritime warfare so conducted being intolerable to the civilisation of the present age. That a main object, which the two Allied Powers in the war of 1854 against Russia had in view, was to put an end to the practice of belligerents issuing Letters of Marque and Reprisals to the subjects of neutral States, is confirmed by the Memoir of M. Drouyn de Lhuys, already mentioned.

"What influenced especially the English Government was the fear of America inclining against us, and lending to our enemies the co-operation of her hardy volunteers. The Maritime population of the United States, their enterprising marine, might furnish to Russia the elements of a fleet of privateers, which attached to its service by Letters of Marque and covering the seas with a network would harass and pursue our commerce even in the most remote waters. To prevent such a danger the Cabinet of London held it of importance to conciliate the favourable disposition of the Federal Government. It had conceived the idea of proposing to it at the same time as to the French Government and to all the Maritime States, the conclusion of an arrangement, having for its object the suppression of privateering, and permitting to be treated as a Pirate every one, who in time of war should be found furnished with Letters of Marque. This project, which was in the end abandoned, is evidence of the disquiet felt by England. We thought, as they did, respecting privateering, a barbarous practice which marked too often, under an appearance of patriotic devotion, violence excited by the allurement of lucre. At former epochs, justified by the fury of war, it was able in the midst of numerous iniquities, to give rise to some heroic action, to transmit even to history some glorious names. But we considered it tc be incompatible henceforth with the usages of civilized nations, which

cannot allow private persons to be armed with the rights of war, and which reserve their terrible application to the public power of Established States.* "

Such was the object in view of the Allied Powers in the war against Russia, according to the highest authority. We find also a statement from the same authority, namely, the French Minister for Foreign Affairs, in his Report† to the Emperor of the French, of 29th March, 1854, that the motive of the Allied Powers was to mitigate the disastrous effects of war upon the commerce of neutral nations and to relieve it from all unnecessary shackles, and accordingly the Emperor of the French published a Declaration at the conclusion of which he announced that he had no intention to deliver "Lettres de Marque pour autoriser les armements en Course." On the other hand the British Government issued a corresponding Declaration on 28th March,

* Ce qui touchait particulièrement le Gouvernement Anglais, c'était la crainte de voir l'Amérique incliner contre nous et prêter à nos ennemis le concours de ses hardis volontaires. La population maritime des Etats Unis, leur marine entreprenante, pouvaient fournir à la Russïe les éléments d'une flotte de corsaires, qui, attachés à son service par des lettres de marque, et couvrant les mers comme d'un réseau, harceleraient et poursuivraient notre commerce jusque dans les parages les plus reculés. Pour prévenir ce danger, le Cabinet de Londres tenait beaucoup à se concilier les bonnes dispositions du Gouvernement Fédéral. Il avait conçu l'idée de lui proposer, en même temps qu'au Gouvernement Français et à tous les Etats Maritimes, la conclusion d'un arrangement ayant pour but la suppression de la course et permettant de traiter comme pirate, quiconque en temps de guerre serait trouvé muni de lettres de marque. Ce projet, qui fut abandonné dans la suite, témoigne de l'inquiétude éprouvée par les Anglais. Nous pensions comme eux sur la course, pratique barbare, qui masquait trop souvent sous une apparence de dévouement patriotique la violence excitée par l'appât du lucre. A des époques antérieures, justifiée par l'acharnement des guerres, elle avait pu du sein des nombreuses iniquités faire jaillir quelques actions heroïques, transmettre même à l'histoire quelques noms glorieux. Mais nous la considérions comme incompatible désormais avec les usages des nations civilisées, qui ne peuvent souffrir que des particuliers soient armés des droits de la guerre, et qui en réservent les redoutables applications aux pouvoirs publics des Etats Constitués.—P. 14.

† British and Foreign State Papers, XLVI., p. 243.

1854, announcing that it was not the intention of the Queen of the United Kingdom to issue Letters of Marque for the commissioning of privateers.

No occasion for the interpretation of the first article of the Declaration of Paris of 1856 arose in its application to a war, in which both the belligerent parties were signatories of that Declaration, before the Franco-German war of 1870, when the Prussian Government issued a Decree (24th July, 1870), relating to the Constitution of a Volunteer Naval Force. Under that Decree the King of Prussia invited all German Seamen and Shipowners to place themselves and their forces and ships suitable thereto at the service of the Fatherland. The officers and crews were to be enrolled by the owners of the ships and were to enter into the Federal Navy for the continuance of the war, and to wear its uniform and badge of rank, to acknowledge its competence and to take an oath to the Articles of War. The ships were to sail under the Federal Flag and to be armed and fitted out for the service allotted to them by the Federal Royal Navy. The ships destroyed in the service of their country were to be paid for to their owners at a price taxed by a Naval Commission, and a sum was to be paid by the State as a deposit, when the ships were placed at the service of the State, which, at the end of the war, when the ships were restored to the owners, was to be reckoned as hire. The French Government, regarding the institution by Prussia of a volunteer naval force as the revival of privateering under a disguised form, lost no time in calling the attention of the British Government to the Royal Prussian Decree, as instituting an auxiliary marine contrary to Prussia's engagements under the Declaration of 1856. Earl Granville, on behalf of the British Government, referred the matter to the Law Officers of the Crown, and in accordance with their opinion returned for answer, "that there was a substantial

difference between the proposed Naval Volunteer Force sanctioned by the Prussian Government and the system of Privateering which, under the designation of 'La Course,' the Declaration of Paris was intended to suppress, inasmuch as the vessels referred to in the Royal Prussian Decree would be for all intent and purposes in the service of the Prussian Government, and the crews would be under the same discipline as the crews on board vessels belonging permanently to the Federal Navy." Upon these considerations the British Government could not object to the Decree of the German Government as infringing the Declaration of Paris.*

There is not an unanimity of opinion amongst text writers on International Law on the subject of this Prussian Auxiliary Marine, as to whether its institution was in conflict with the Declaration of Paris or not. M. Charles Calvo, Ancien Ministre, considers that vessels equipped in accordance with the Prussian Decree may be regarded as privateers of an aggravated character, seeing that the owners are not required to give security for their good conduct; † and Mr. W. E. Hall, in his recent work on International Law, p. 455,‡ observes that "unless a Volunteer Navy could be brought into closer connection with the State than seems to have been the case in the Prussian project, it would be difficult to show that its establishment did not constitute an evasion of the Declaration of Paris." But neither of these eminent publicists seem to have given sufficient weight to the provisions of the Prussian Decree, under which the officers and crew were required to enter into the Federal Navy for the continuance of the

* British and Foreign State Papers, LXI., p. 692. Perels. Manuel de Droit Maritime International, p. 195. Paris, 1884.

† Le Droit International. Troisième Edition. Tome Troisième, p. 303. Paris, 1880.

‡ International Law. Oxford, at the Clarendon Press. 1880.

war, were to wear its uniform and to take an oath to the Articles of War. Further, the vessels were to be fitted out by the State, and were to sail under the Public Flag of the State.

On the other hand, Professor Geffcken, in his recent edition of Heffter's Droit International de l'Europe (Paris, 1883), p. 278, and Dr. Charles de Boeck in his masterly treatise on Enemy's Property under an Enemy's Flag,* have recognised a broad distinction between such an auxiliary force, which under the Royal Decree was intended to be employed solely against the enemy, and privateers, which may be of no matter what nationality, and whose main object it has always been to prey upon neutral commerce, keeping up the worst traditions of private warfare under cover of Letters of Marque. It should be observed that the Prussian Government never gave practical effect to the Royal Decree on this subject, and that no vessel of the "Seewehr," as instituted in 1870, ever put to sea. (Staats Archiv., 4,345, 4,346.)

The other point upon which some indirect light has been thrown in the course of the Franco-German war is the interpretation to be given to the exception in the second and third Articles of the Declaration as regards contraband of war. On the occasion above-mentioned of the institution of the Prussian Seewehr, the French Government raised the question whether such an institution would not be at variance with the first Article of the Declaration of Paris. But the Prussian Government had previously raised a question as to whether Great Britain was observing an honest neutrality in allowing English vessels to be chartered at Newcastle to provision the French fleet in the North Sea with coal, and further, as may be inferred from a despatch of Earl Granville, of August 3, 1870, to Lord

* De la Propriété Privée Ennemie sous Pavillon Ennemi. Paris. 1882.

A. Loftus, at Berlin,* had demanded that Great Britain should not only forbid, but absolutely prevent the exportation of articles contraband of war, and that she should keep such a watch upon her ports as to make it impossible for such articles to be exported from them. "It requires," Earl Granville writes in reply, "but little consideration to be convinced that this is a task which a neutral nation can hardly be called upon to perform. Different nations take different views at different times as to what articles are to be ranked as contraband of war, and no general decision has been come to on the subject. Strong remonstrances, for instance, have been made by Count Bismarck against the export of coal to France, but it has been held by Prussian authors of high reputation† that coal is not contraband, and that no one Power, either neutral or belligerent, can pronounce it to be so. But even if this point were clearly defined, it is beyond dispute that *the contraband character would depend upon the destination.* The neutral Power could hardly be called upon to prevent the exportation of such cargoes to a neutral port, and if this be the case, how could it be decided at the time of departure of a vessel, whether the alleged neutral destination was real or colourable? The question of the destination of the cargo must be decided in the Prize Court of a belligerent, and Prussia could hardly seriously propose to hold the British Government responsible, whenever a British ship carrying a contraband cargo should be captured, while attempting to enter a French port."

This is probably the first occasion, on which the question, whether "Coal" is to be considered contraband of war within the meaning of the Declaration of Paris, has been raised. The British Government had already admitted in a previous communication from Lord A. Loftus to Count Bismarck

* British and Foreign State Papers, LX., p. 973.

† Heffter Le Droit International de l'Europe, § 161.

that coal, on a voyage from a British port to be delivered direct on board of a French man-of-war engaged in hostile naval operations against Prussia, would be liable to capture as contraband of war, and Earl Granville's despatch states more explicitly the general principle, that the contraband character of coal will depend upon its destination. But the despatch also affirms another general principle of the highest importance, that the question of the destination of the cargo must be decided in a Prize Court of the Belligerent.

This brings us to the consideration of a very important feature in the history of Maritime Law, namely, the influence which particular States have been able to exercise upon the development of that Law by the judgments of their Prize Courts in time of war. It has been well observed by Mr. Chancellor Kent,* in reviewing the growth of the existing system of International Law, that "many of the most important principles of public Law have been brought into use and received a practical application and been reduced to legal precision since the age of Grotius and Puffendorf, and we must resort to the judicial decisions of the Prize Tribunals in Europe and in this country (the United States of North America) for information and authority in a great many points, on which all the leading Text Books have preserved a total silence." In accordance with Chancellor Kent's observation, jurists have been accustomed to look to the Prize Tribunals of the United States for precedents in the Administration of International Law, to which nations may conform themselves in full confidence that there will be no departure from the use and practice of Nations. We have alluded to the war in which France and Great Britain were engaged as allies against China as one of the eight great wars, in which one of the belligerent parties was not an adherent

* Kent's Commentaries on American Law, Part I., § 70.

to the Declaration of Paris. Another of those great wars, to which we have hitherto made no special allusion, was a war in which neither of the Belligerent parties was an adherent to that Declaration, and which had also an exceptional character, being in the nature of a Civil War, and as such liable to give rise to some confusion of ideas in relation to the mutual rights and duties of the belligerents and the subjects of neutral Powers. We have already alluded to the fact that the Government of the United States declined in 1856 to accede to the Declaration of Paris, having an objection to agree to the First Article, unless the Signatory Powers would go a step further, and to use the language of Mr. Buchanan in an earlier conversation with Lord Clarendon in the month of March, 1854, "would consent that war against private property should be abolished altogether on the ocean, as it had already been upon the land." The United States have consequently remained outside the European Concert on the subject of the abolition of privateering, although they have passed laws to restrain American citizens from entering into foreign privateer service. With regard to the other three articles of the Declaration, the independent practice of the United States has been in accordance with the second and third articles, and as regards the fourth and concluding article Mr. Marcy, the United States Secretary of State in his answer of July 28, 1856, to the invitation of the Signatory Powers of the Declaration of Paris, admitted that the fourth article of the Declaration merely reiterated a general undisputed maxim of maritime law, but he very justly observed that it did nothing towards relieving the subject of blockade from embarassment. "What force," he said, "is requisite to constitute an effective blockade remains as unsettled and as questionable as ever it was before the Congress adopted the Declaration." It may therefore be taken for granted that the United States of America hold the same

doctrine as to the conditions necessary to make a blockade binding on neutrals, which is maintained by the Signatory Powers of the Declaration of Paris.

The insurrection of seven of the Southern States of the Federal Union of North American States having acquired the proportions of a Civil War, the Government of the Union gave notice to the European Powers that they had established a blockade of the entire Atlantic Coast of the United States from the Bay of Chesapeake to the mouth of the Rio Grande, an extent of about three thousand miles. From a correspondence respecting Instructions given to Naval officers of the United States in regard to Neutral Vessels and Mails laid before the British Parliament (Parliamentary, Papers, North America, No. 5 (1863)), it appears that the United States Flag-officer at Key West informed the British Commander Hewett that the United States cruizers had received orders to seize any British vessels, whose names were forwarded to them from the Government of Washington, and that the fact of such vessels being bound from one British port to another would not prevent the United States Officers from carrying out those orders. A representation was accordingly made by Mr. Stuart, the British Chargé d'Affaires at Washington, to Mr. Seward, the Secretary of State, in consequence of the capture of the British steamer *Adela*, bound from Liverpool and Bermuda to Nassau, for which latter port she was carrying a British mail, and the Secretary of State on the following day communicated to Mr. Stuart a new set of Instructions, which he was addressing in the name of the President to the Secretary of the Navy, "laying down rules for the future guidance of United States Naval Officers, which essentially modified the Instructions, under which they had been latterly supposed to be authorised to seize certain ships, of which a list had been furnished, when or where those ships were met with,

irrespective of the observance of international law." Mr. Seward subsequently communicated to Mr. Stuart a copy of the Instructions, which the President had directed him to trasmit to the Secretary of the Navy, and which copy was in fact forwarded by Mr. Stuart to her Brittanic Majesty's Principal Secretary of State for Foreign Affairs.

Having premised that it was the duty of the Naval Officers to be vigilant in searching and seizing vessels of whatever nation, which were carrying contraband of war to the insurgents of the United States, but that it was equally important that the provisions of the Maritime Law in all cases be observed, the instructions proceeded to direct in the third article, that when the visit was made the vessel was then not to be seized without a search carefully made, so far as to render it reasonable to believe that she was engaged in carrying contraband of war to the insurgents and to their ports, or otherwise violating the blockade, and that if it should appear that she was actually passing from one friendly or so-called neutral port to another, and not bound or proceeding to or from a port in the possession of the insurgents, she could not be lawfully seized. The date of these Instructions was 8th August, 1862. They were cautiously worded, and if they had been carefully observed by the cruizers of the United States, their execution of the duty confided to them could have given no cause of offence to neutral nations.

A question however arose in the course of the second year of the Civil war, namely, in the month of February, 1863, which is of wide-world interest as regards neutral commerce in time of war, and as a consequence of which, if the judgment of the Supreme Court of the United States is to be treated with the respect heretofore paid to that high tribunal and its decree in this case is to be generally accepted as a precedent, it may be reasonably feared that the commerce of neutrals will be subjugated for the future to

belligerent exigencies to an extent never before submitted to; —an extent, to borrow the words of an eminent American jurist, formerly United States Secretary of State,* "not tolerable either to their interests or to their pride."

It appears that a British vessel, named the *Springbok*, which had sailed from London on 8th December, 1862, bound for Nassau, was crossing the Atlantic, and was on 3rd February, 1863, at the distance of about 150 miles to the eastward of Nassau, the capital of New Providence, one of the group of the Bahama Islands, when she was seized by the United States cruizer, *Sonoma*, and sent in as prize to the Port of New York. She was there libelled in the District Court, and both vessel and cargo were condemned by a decree of that Court as lawful prize. The judgment of the Court was delivered by the Honorable Samuel R. Betts, Judge of the District Court of the Southern District of New York, and the tenor of the Decree was as follows:—

"United States District Court.

"The United States *v.* the Barque *Springbok* and Cargo.

"This suit having been heard by the Court upon the pleadings, proofs and allegations of the parties, and evidence legally invoked therein from other cases, and the premises being fully considered, and it being found by the Court therefrom that the said vessel at the time of her capture at sea was knowingly laden in whole or in part with articles contraband of war with intent to deliver such articles to the aid and use of the enemy; that the true destination of the said ship and cargo was not to Nassau, a neutral port, and for trade and commerce, but to some port lawfully blockaded by the forces of the United States, and with intent to violate such blockade; and, further, that the papers of the said vessel were simulated and false.

* The Honorable William M. Evarts.

Wherefore the condemnation and forfeiture of the vessel and cargo is declared. Ordered that a decree be entered accordingly."

There could be no uncertainty as to the law applicable to such a case, if it be assumed that the facts warranted the conclusions of the learned judge, namely, that the vessel was bound to a blockaded port, and that the ship-papers were simulated and false. The owners, however, of the ship and cargo appealed from the judgment of the District Court of New York to the Supreme Court of the United States. That High Court, consisting of nine judges, took a totally different view of the facts of the case, and decreed the vessel to be released, being satisfied that the ship was bound to Nassau, where her voyage was to end, and that her ship-papers were genuine and regular.

The language of the Supreme Court as reported in 5 Wallace's cases before the Supreme Court, p. 21, was as follows:—

"Her papers were regular, and they all showed that the voyage on which she was captured was from London to Nassau, both neutral ports within the definitions of neutrality furnished by international law. The papers were all genuine, and there was no concealment of any of them and no spoliation. Her owners were neutrals, and do not appear to have had any interest in the cargo, and there is no sufficient proof that they had any knowledge of its alleged unlawful destination."

"The preparatory examinations do not contradict, but rather sustain the papers."

Bearing in mind the instructions which the President of the United States had directed to be sent to the commanders of the United States cruisers, that before seizing any vessel they were to examine carefully her papers, and if it should appear from them "that she was actually passing from one friendly or so-called neutral port to

another, and not bound to or from a port in the possession of the insurgents, the vessel could not be lawfully seized;" it would seem *primâ facie* that the commander of the *Sonoma* either failed in his duty to examine the papers of the *Springbok* before he made prize of her, or that he seized her in despite of the President's instructions.

It would have been reasonable for the owners of the cargo to expect a reversal of the decree of the District Prize Court in regard to the cargo, as a consequence of the finding of the Supreme Court of the fact that the ship was passing from one neutral port to another, where she was to discharge her cargo, for the District Court had condemned the cargo as in whole or in part contraband of war by reason of the ship's destination being an enemy's port. It has been already observed that, according to the practice of European Prize Courts, an actual destination of the ship and cargo to an enemy's port or to an enemy's army or fleet, is necessary to warrant a belligerent in capturing a neutral cargo on the high seas and confiscating it as contraband of war, namely, as forbidden to be carried to the enemy. The Supreme Court passed over the question of "contraband or not contraband" as of secondary importance in the view which the Court took of the law applicable to the case of the cargo, and proceeded to declare it good prize of war upon grounds, which in matter of law find no support in any reported judgment of European or American Prize Courts in any previous war, and which, in matter of fact, were founded on a surmise.

We quote from the same volume of Wallace's Reports' p. 27, the concluding words of the finding of the Supreme Court in regard to the cargo of the *Springbok* :—

"Upon the whole we have no doubt that the cargo was originally shipped with intent to violate the blockade; that the owner of the cargo intended that it should be transhipped at Nassau in some vessel more likely to

succeed in reaching safely a blockaded port than the *Springbok;* that the voyage from London to the blockaded port was, as to the cargo, both in law and in the intent of the parties one voyage; and that the liability to condemnation, if captured during any part of that voyage, attached to the cargo from the time of sailing."

Of the four propositions above stated, the two first are findings of fact, and the two latter are statements of law. We pass over the former as having no general application. It is with the statements of law that neutral Nations are seriously concerned, for the theory of Continuous Voyages applied to blockades, after the precedent of the *Springbok*, would amply justify a powerful belligerent in sweeping the wide ocean clear of neutral merchant ships, as soon as it has declared an enemy's coast to be under blockade. We have already remarked that during the late Civil War the Government of the United States declared the whole of its coasts, to the extent of three thousand miles, to be under blockade, and the Supreme Court did not consider itself bound to fix the owners of the cargo on board the *Springbok* with an intention to re-ship it for any particular blockaded port, but generally for some port or other under blockade. Let us suppose, what we hope may not happen, that France should become openly at war with China, and should declare the entire Chinese sea-coast to be under blockade. France as a Belligerent Power might claim a right upon the precedent of the *Springbok* to seize every British or Dutch merchant ship passing along the Tunisian coast of the Mediterranean on its way to the Suez Canal, and although a French Prize Court might be satisfied upon an examination of the papers on board the ship, that the ship itself was bound to the neutral port of Singapore or of Hong Kong, it might surmise upon extraneous information that the cargo, after it

had been discharged at the port of the ship's destination, was intended to be re-shipped in some other vessel, say a German vessel, (for German ships have at present a large share of the carrying trade between Hong Kong and the Chinese ports), and to be forwarded to a blockaded port. Upon such a surmise, if the judgment of the Supreme Court of the United States, in the case of the cargo of the *Springbok*, is to be accepted as a precedent, a French Prize Court would be justified in confiscating the cargoes of all such captured vessels, although it decreed the release of the vessels themselves.

A question naturally suggests itself on looking at the finding of the Supreme Court as to the destination of the ship, and as to her papers being all regular and genuine, how we are to account for the seizure of the vessel in disregard of the Instructions issued by order of the President of the United States and communicated by the Secretary of State to the British Chargé d'Affaires at Washington.

A document has recently been published, which throws light on the true grounds of the seizure of the *Springbok*. It seems that his Excellency Lord Lyons, the British Minister Plenipotentiary at Washington, made a representation to the American Government relative to the capture of the *Springbok*, and that Mr. Seward, the U.S. Secretary of State, in his reply of 25th March, 1863, stated that, according to a brief report made to the Navy Department of U.S., it appears that the *Springbok* had been seized "because she had no proper manifest, and nothing to show the character of her cargo, which the captain of the vessel said he was ignorant of." A recent publication has disclosed the fact that the U.S. Secretary of State was misinformed on this occasion, for the official dispatch, in which the commander of the *Sonoma* reported to the U.S. Secretary of the Navy that he had captured the *Springbok*, gives quite another account of the grounds of capture. We quote the

despatch from "Le Mémorial Diplomatique" of Saturday, 9th June, 1883:—

"U.S.S. *Sonoma*.

"February 3d 1863.

"At sea, lat. 25° 35′ North, long. 73° 40′ West.

"To the Honble. Secretary of the Navy.

"Sir,—I have the honor to inform you, while cruising for the *Oreto*, I have this day captured in lat. and long. as above mentioned, the English barque *Springbok*, one of the vessels designated as a contraband loader upon the list furnished me by Rear-Admiral Wilkes.

"I send the *Springbok* to New York in charge of Acting-Master Willis.

"Very respectfully, your obdt. servt.,

(Signed) "T. H. STEVENS, Commander U.S. Navy."

An explanation of the allusion in this letter to a list of vessels furnished to Commander Stevens by Rear-Admiral Wilkes is probably forthcoming in a paper communicated by the Hon. Charles Francis Adams, the United States Minister in London, to Earl Russell on 30th December, 1862, which has been published as part of the correspondence respecting the *Alabama*, laid before the British Parliament. (North America, No. 3, 1883.) It appears from this paper that Mr. Morse, the United States Consul-General in London, had compiled a list of vessels "which he believed could be relied on as being a part of those which had left the port of London laden with supplies, principally contraband of war." The list in question, known subsequently by the familiar name of the *Black List*, contains the names of twenty-two vessels of which twenty are steam-vessels and two are sailing vessels, the last on the list being the sailing vessel *Springbok*, respecting which no particulars beyond her name are given. The circumstance that the name of the *Springbok* had been

inserted on this list, if it be assumed that a copy of it was furnished to the Commander of the United States cruiser *Sonoma*, might have warranted him in suspecting her papers to be simulated and false, and in sending the vessel into port for further enquiry; but the Supreme Court of the United States, after having kept the question before it during three entire years, and having had the case twice argued before it, came to the conclusion that the *Springbok's* papers were neither simulated nor false, and that the true destination of the *Springbok* was Nassau a neutral port in New Providence, and with regard to the cargo being principally contraband of war it was found to consist almost entirely of general merchandize not suitable for purposes of war. I do not propose to discuss the facts proved in evidence before the Supreme Court; it may be sufficient to say that the cargo of the *Springbok* appears to have been condemned in consequence of a suspicion, which had been raised in the mind of the Court by extraneous information, that it was intended, as matter of fact, to be transhipped at Nassau and to be forwarded in another vessel to some blockaded port.

The Court, on this suspicion, held itself to be justified under the circumstances under which that suspicion had arisen, in ruling that the surmised ulterior voyage of the cargo was both in law and in the intent of the parties one voyage with the actual voyage in which it was captured from London to Nassau, and that a liability to condemnation, if the vessel was captured during any part of the voyage from London to Nassau, attached to the cargo from the time of sailing.

Such a severe exposition of the Law of Blockade is not to be found on record in any reported Judgment of the European Prize Courts, and it is not too much to say that it has added a *new terror to war* as regards neutral commerce, and has also introduced a new *ratio decidendi* into Prize proceedings, to which other nations may with justice demur.

In the particular case of the *Springbok*, it is well known that the Judges of the Supreme Court were not unanimous, and that three of them at least dissented from the opinion of the majority. Further, it has been stated, in a letter from the late Honourable Samuel Nelson, one of the associate Judges who heard the Appeal, addressed to the distinguished American Jurist, Mr. W. Beach Lawrence, the learned Editor of "Wheaton's Elements of International Law," who disapproved of the judgment, "that the Supreme Court was not familiar with the Law of Blockade at the time when the appeal in the case of the *Springbok* came before it," and that the minds of several of the Judges were warped by patriotic sentiments and by resentment against England. In fact, public feeling was at that time strongly excited in the United States by the depredations of the Confederate privateers, and the Judges, as individual citizens, were no exception to that feeling. Such a confession does honour to the Associate Judge, and relieves the Supreme Court of any possible suspicion that might otherwise have attached to it, that it conceived it to be its duty, as a Court of Prize, to support the action of the Navy of the United States, even if it should be guilty of excessive vigilance and overzealous exercise of belligerent right in carrying out its Instructions under the emergencies of a Civil War. On the other hand, the Executive Government of the United States has always avowed a readiness on its part to redress any grievance resulting to neutral commerce from the decision of its Prize Courts, if the circumstances appear to call for it. The case of the *Adela* may be cited, in which the Hon. W. Seward, the United States Secretary of State, thus expressed himself in a note addressed to the Hon. W. Stuart, the British Chargé d'Affaires at Washington, on 27th September, 1863:—
"If the principles of Maritime Law shall finally be decided

against the claimants, due reparation therefor shall be made. The Government has no disposition to claim any unlawful belligerent rights, and will cheerfully grant to neutrals, who may be injured by the operations of the United States forces, the same redress which it would expect, if the position of the parties were reversed." These are noble words, worthy of the Representative of a Great Nation, which can afford to be both generous and just.

It is not an unimportant fact to which the Government of the United States may justly attach some weight, that the members of a Commission of the Institute of International Law, appointed to consider the subject of Maritime Prize, have concurred in a Consultation on the subject of the condemnation of the cargo of the *Springbok*, in which, having expressed their opinion that the application of the theory of Continuous Voyages to the cargo of that vessel was a retrogade step calculated to aggravate the shackles (entraves) imposed upon neutral commerce in time of war, they observe that its effect as regards the law of blockade will be to convert every neutral port, to which a neutral cargo may have been despatched, into a port *blockaded by interpretation*, as soon as there may be motives to suspect that the cargo having been discharged at that port may be reladen in another vessel and forwarded to a port actually blockaded. It were much to be desired, is the concluding paragraph of the Consultation, that the Government of the United States of America, which has been the zealous promoter of several ameliorations in the rules of maritime warfare in the interest of neutrals, should take an early opportunity, in such form as it shall deem most suitable, to declare that it does not intend to accept and consecrate the theory, formulated as above, as an element of its maritime jurisprudence in matters of prize, nor as a rule of international law binding in future on its Prize Courts.*

* En conséquence, les soussignés concluent qu'il est très désirable, que le

Since I took up my pen to review the progress made during the last thirty years in rendering war less onerous to neutrals, a debate has taken place in the Upper Chambers of the States General of the Netherlands on the subject of the condemnation of the cargo of the *Springbok* with a view to prevent the doctrine, upon which the Supreme Court of the United States justified its decision, from being generally accepted in European Prize Courts. Count van Lynden van Sandenburg, Minister of State, in the Sitting of the Upper Chamber of the States General on Friday, 25th January, 1884, in the course of his speech, in which he set forth the history of the capture and release of the vessel and the condemnation of her cargo, stated that he knew that the attention of several Powers is now directed to the question, which has at length assumed an *international* character, seeing that it vitally affects neutral rights. "It matters not," he said, "who the owners of her cargo may be, to what nationality they may belong, whether they are English, French, Dutch, or even American. A great principle is at stake, and the only satisfactory and conclusive proof that the United States Government can give, that it at length abandons and renounces a doctrine destructive of neutral trade, and a judgment pronounced in error, will be the awarding full compensation to the despoiled owners of the cargo, the long-suffering victims of a flagrant miscarriage of justice. Now is it not," he continued, "the clear course, is it not the duty of the Netherlands Government, of the government of the country, which gave birth

gouvernement des Etats-Unis d'Amérique, le quel a été le promoteur zélé de plusieurs amêliorations apportées aux règles de la guerre maritime dans l'interêt des neutres, saisisse la première occasion pour proclamer, dans telle forme qu'il jugera convenable, qu'il n'a pas l'intention d'accepter et de consacrer la théorie ci-dessus formuleé comme élément de sa doctrine juridique sur les prises maritimes, et pour déclarer, qu'il désire que la condemnation du chargement du *Springbok* ne soit pas adoptée par ses Tribunaux comme précédent de jurisprudence, et comme règle de leurs decisions pour l'avenir.

to Hugo Grotius, to approach the United States of North America in conjunction with other Maritime Powers, for the purpose of prevailing on their Government to retrace its steps. In my opinion it is clearly our duty."

Herr Van der Does de Willebois, the Netherlands Minister of Foreign Affairs, in his reply, stated that the Netherlands Minister at Washington had already been instructed to take every opportunity to press earnestly the subject on the American Government.

In conclusion, I may add that the countrymen of Benjamin Franklin may fitly lend an ear to the countrymen of Grotius. Europe has listened to the counsels of Benjamin Franklin, who in his letter of 14th March, 1783, quoted in the instructions sent by Mr. Adams, Secretary of State in 1823, to Mr. Rush, the Minister of the United States in London, was the first to set in motion the idea "that it was high time, for the sake of humanity, to put a stop to the enormity of private war upon the sea." The Dutch, on the other hand, were the first nation in Europe to regulate the practice of blockade, and with that object in view they issued an ordinance on 26th June, 1630,* upon the advice of their Courts of Admiralty, requiring three things to be proved before a neutral vessel should be confiscated with its cargo by sentence of the said Courts—namely (1), the existence of a blockade *de facto*; (2), the notoriety of such a blockade; (3), a clear intention to violate the blockade.

The Dutch nation has thus an hereditary title as it were to raise its voice against the theory of Continuous Voyages being ingrafted on the law of blockade, seeing that it would result in a general license to Prize Courts to hold any neutral port to be a *port blockaded by interpretation*. It may be presumed that the Judges of the

* Robinson's "Collectanea Maritima," page 158, quoted in Twiss's "Law of Nations in Time of War," 1875, p. 196.

Supreme Court of the United States did not foresee the wide scope of interference with neutral commerce, which *the doctrine of blockade by interpretation* would authorize, and that they overlooked the fact that no evidence can in the nature of things be forthcoming in the ship's-papers or in the cargo-papers to refute a suggestion of a possible reshipment of the cargo on board of another vessel destined to a blockaded port, after it has been delivered at the port of the ship's actual destination. Besides it is an axiom of Maritime Prize Law, that with regard to the cargo on board of a general ship the Manifest and the Bills of Lading are the best evidence of both the ownership and the destination of the cargo.

It has been the singular honour of the late Lord Kingsdown, who presided over the English High Court of Appeal in Prize Cases during the Crimean War, to have applied the Law of Blockade to neutral vessels with an equity unknown to the Prize Court in the days of Lord Stowell, and which a veteran Judge of the English High Court of Admiralty,* who had practised in Prize Cases before Lord Stowell, considered to be too favourable to neutrals. It was also in former days the pride of the Supreme Court of the United States to have framed its practice in Prize Causes after the rules of the British Courts of Prize, which, as observed by one of the most eminent jurists of the United States, Mr. Justice Story,† are conformable with the Prize practice of France and other European countries. It would be deeply to be regretted that upon the Law of Blockade the Prize Courts of the two countries should proceed henceforth on divergent lines, and that whilst the British High Court of Appeal has been striving to render the Law of Blockade less onerous to neutrals by tempering its administration with greater equity, the Supreme Court

* The Right Hon. Dr. Lushington.

† Wheaton's Admiralty Reports, vol. I., Appendix, p. 494.